

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RICHARD M. FLEMING,

Case No. 3:13-cv-00154-MMD-VPC

Plaintiff,

v.

ORDER

UNITED STATES,

Defendant.

I. SUMMARY

Before the Court is Defendant United States' Motion to Dismiss. (Dkt. no. 19.) For the reasons set forth below, the Motion is granted.

II. BACKGROUND

Plaintiff Richard M. Fleming seeks relief against the United States for a 2009 felony conviction that he claims was unlawful. (Dkt. no. 12 at 5.) Plaintiff's Complaint provides few facts concerning the details of the 2009 conviction and his subsequent attempts for relief. The Court, therefore, looks to Defendant's Motion to Dismiss for the relevant background. Mr. Fleming was indicted by a federal grand jury in the District of Nebraska in 2007. He pled guilty to one count of health care fraud and one count of mail fraud following a two-week trial but before the jury announced the verdict. (Dkt. no. 19 at 4–5.) Judgment was entered in the criminal action in 2009. (*Id.* at 5.) Mr. Fleming filed a pro se motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence. (*Id.*) The Nebraska District Court denied Mr. Fleming's claims for relief and the Eighth Circuit Court of Appeals dismissed his appeal. (*Id.* at 5–6.)

1 On June 16, 2010, Mr. Fleming filed a pro se petition for writ of habeas corpus
2 with this Court pursuant to 28 U.S.C. § 2241. (*Id.* at 6.) This Court transferred the
3 habeas action to the District of Nebraska. The Ninth Circuit denied Mr. Fleming's appeal
4 of the transfer. The District of Nebraska dismissed Mr. Fleming's habeas petition. Mr.
5 Fleming appealed the dismissal of his habeas petition to the Eighth Circuit, which
6 dismissed his appeal as well as his subsequent motion for reconsideration and petition
7 for panel rehearing and rehearing en banc. (*Id.* at 6–7.)

8 On November 23, 2011, Mr. Fleming once again filed a pro se petition for writ of
9 habeas corpus with this Court pursuant to 28 U.S.C. § 2241. The case was transferred
10 to the District of Nebraska, which construed Mr. Fleming's claim as a claim under 28
11 U.S.C. § 2255. (*Id.* at 7.) The District Court dismissed Mr. Fleming's habeas petition and
12 the Eighth Circuit summarily affirmed. The Eighth Circuit also denied Mr. Fleming's
13 motions for panel rehearing, rehearing en banc, and recall of the mandate. (*Id.*) The U.S.
14 Supreme Court denied Mr. Fleming's petition for writ of certiorari. (*Id.*)

15 Mr. Fleming brings the instant case under the International Covenant on Civil and
16 Political Rights (ICCPR). He seeks compensatory damages for loss of income as a result
17 of losing his medical license following his criminal conviction. (Dkt. no. 12 at 5.) Mr.
18 Fleming's Complaint appears to challenge this Court's transfer of his November 23,
19 2011, petition for writ of habeas corpus to the District of Nebraska. Mr. Fleming also
20 seeks consideration of said petition's argument that his 2009 conviction was unlawful.

21 **III. LEGAL STANDARD**

22 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
23 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
24 "a short and plain statement of the claim showing that the pleader is entitled to relief."
25 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
26 Rule 8 does not require detailed factual allegations, it demands more than "labels and
27 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
28 *Iqbal*, 556 US 662, 678 (2009) (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

1 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
2 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
3 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at
4 678 (internal citation omitted).

5 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
6 apply when considering motions to dismiss. First, a district court must accept as true all
7 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
8 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,
9 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district
10 court must consider whether the factual allegations in the complaint allege a plausible
11 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
12 alleges facts that allow a court to draw a reasonable inference that the defendant is
13 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
14 court to infer more than the mere possibility of misconduct, the complaint has “alleged
15 but not shown that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks
16 omitted). When the claims in a complaint have not crossed the line from conceivable to
17 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint must
18 contain either direct or inferential allegations concerning “all the material elements
19 necessary to sustain recovery under *some* viable legal theory.” *Id.* at 562 (*quoting Car*
20 *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989) (emphasis in
21 original)). Pro se complaints are subject to “less stringent standards than formal
22 pleadings drafted by lawyers” and should be “liberally construed.” *Erickson v. Pardus*,
23 551 U.S. 89, 94 (2007) (internal quotation marks omitted).

24 IV. DISCUSSION

25 Defendant construed Plaintiff’s claim in its Motion to Dismiss as an action under
26 the Federal Tort Claims Act (FTCA) because Mr. Fleming seeks compensatory damages
27 against the federal government. Mr. Fleming states in his response that “this case is

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1 NOT filed under the FTCA” and clarifies that the sole legal basis for his Complaint is the
2 ICCPR. (Dkt. no. 21 at 2.)

3 “For any treaty to be susceptible to judicial enforcement it must both confer
4 individual rights and be self-executing.” *Cornejo v. County of San Diego*, 504 F.3d 853,
5 856 (9th Cir. 2007). The ICCPR is not self-executing nor has it been found to confer
6 private individual rights. See 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992); see also
7 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“Several times, indeed, the Senate
8 has expressly declined to give the federal courts the task of interpreting and applying
9 international human rights law, as when its ratification of the International Covenant on
10 Civil and Political Rights declared that the substantive provisions of the document were
11 not self-executing.”). The Supreme Court explains that “although the [ICCPR] does bind
12 the United States as a matter of international law, the United States ratified the [ICCPR]
13 on the express understanding that it was not self-executing and so did not itself create
14 obligations enforceable in the federal courts.” *Sosa*, 542 U.S. at 735.


15 Mr. Fleming explicitly states that the sole legal basis for the Complaint is the
16 ICCPR. Because the ICCPR is not enforceable in federal courts on behalf of individual
17 plaintiffs, Mr. Fleming has failed to make a claim upon which relief can be granted.

18 **V. CONCLUSION**

19 It is therefore ordered that Defendant’s Motion to Dismiss (dkt. no. 19) is granted
20 and Plaintiff’s Complaint is dismissed with prejudice.

21 It is further ordered that all of Plaintiff’s pending motions (dkt. nos. 8, 9, 11, 23, 24,
22 31, 34, 35, 41, 42, 43, 44, 46, 47, 48, 50, 51, 52, 55, 56) and both of Defendant’s
23 remaining pending motions (dkt. nos. 32 and 40) are denied as moot.

24 DATED THIS 29th day of October 2013.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE